

to the third plaintiff fell through. The statement of claim stated in paragraph 7 that the houses built by the defendant occupied a *major* portion of the land. The second plaintiff was emphatic in his evidence that the portion occupied by these houses was *much more* than a third of the land.

In his reply dated 16th August, 1955, at page 3 of exhibit A, the defendant's solicitor wrote to the first and second plaintiffs' solicitor objecting to the proposed sub-division in these words —

"[The proposed sub-division] is preposterous as the proposed sub-division donates a few houses to [Portion] B".

This means that some houses built by the defendant on Portion A would, if the proposed sub-division were agreed to, go to the second and fourth plaintiffs and the defendant objected to this happening. This should have indicated to Mr. Sen that in the defendant's view there was in existence a previous sub-division, though this was not stated in so many words, and that the sub-division proposed in Mr. Sen's letter differed from the original agreed sub-division. If in fact there had been no original sub-division, one would have expected an immediate written denial to that effect to be despatched to the defendant's solicitor by Mr. Sen. In fact nothing of the kind happened until nearly five years later, 22nd April, 1960, when the plaintiffs, this time all the four, instructed their then solicitors, Messrs. Rajendra and Teik Ee, to write to the defendant the letter at page 4 of exhibit A, stating that what had been done by the defendant had been done without the consent of any of the plaintiffs, and demanding from the defendant an account of the profits derived from the houses and the payment to them of their respective shares in such profits. I am of the view that the absence of any written protest until 22nd April, 1960, against the existence of the agreement which according to the defendant existed, constitutes very strong evidence in favour of the defendant.

During the course of the hearing in company with counsel and all the parties I visited the land. Portion C which according to the defendant had been agreed should belong to the first plaintiff was vacant and, except for a few trees, undeveloped. Portion B which according to the defendant had been agreed should belong to the second plaintiff had a house approximately in its middle. It was built in 1942 by the second plaintiff with the permission from the then co-proprietors and he lives in it today. The houses built by the defendant on his Portion A were built behind a well-defined line. When the first plaintiff wanted to sell his share to the third plaintiff, it was significant to me that he proposed to sell Portion C and not any other portion. When the second plaintiff wanted to sell part of his share to the fourth plaintiff, it was significant to me that he pointed out to her a specific portion between his house and the front

A boundary as being the portion to be allotted to her. All these factors strongly indicate to me that there had been an understanding between the first plaintiff, the second plaintiff and the defendant as to their respective shares on the ground and that this litigation would not have been launched if in fact the defendant had agreed to the delimitation of his portion as proposed by the first and second plaintiffs in their solicitor's letter dated 13th August, 1955.

From their demeanour, it was apparent that the first plaintiff was annoyed by the attitude taken by the defendant though he was somewhat shame-faced by the claim launched against the defendant, while the second and fourth plaintiffs are basically more interested in a fair and just sub-division of the land.

Considering the findings of facts at which I have arrived, I have no alternative but to dismiss the plaintiffs' claims.

But I venture to think that this need not result in an injustice because it is still open to any of the parties to apply to the Collector under section 106 of the Land Code to have a partition of the land made. After such enquiry as may be deemed necessary, the Collector may cause the land to be sub-divided or he may direct a sale of the land. If he sub-divides it, he may in his discretion award sums to be paid for the purpose of equalising the value of the parts. The Collector is familiar with lands and their value in the district and is in an excellent position to do justice among the parties.

Claim dismissed.

F Solicitors: *Rajendra & Teik Ee; Richard Talalla.*

CHUAN SENG & CO. PINEAPPLES FACTORY v. IDRIS & ANOR.

G [C.A. (Thomson C.J., Hill and Good J.J.A.)
March 31, 1962]

[J.B. — F.M. Civil Appeal No. 2 of 1962]

Negligence — Negligence of servant — Liability of master — Accident to unauthorised passengers in lorry — Invitees or trespassers.

H A lorry driver employed by the defendants gave a lift to two persons in his lorry. As a result of the negligence of the driver, the lorry overturned and the two persons were killed. In an action against the defendants on the ground that they were vicariously liable in damages to the estates of the deceased, evidence was adduced, which was uncontradicted, that the driver had been instructed by the defendants not to give lifts.

I The trial judge disbelieved this evidence and stating that it did not matter whether the deceased were invitees or trespassers held that the defendants were vicariously liable. On appeal,

Held: (1) in such cases, the distinction between invitees and trespassers is of the utmost importance;

(2) on the facts, the deceased were clearly trespassers, and the defendants were not therefore liable.

Cases referred to:—

- (1) *Twine v. Bean's Express Ltd.* [1946] 1 All E.R. 202.
- (2) *Conway v. George Wimpey & Co. Ltd.* [1951] 1 All E.R. 363.
- (3) *Grand Trunk Railway of Canada v. Barnett* [1911] A.C. 361.

COURT OF APPEAL.

J. D. Donnelly for the appellants.

T. S. Cheam for the respondents.

Thomson C.J. (delivering oral judgment):
This is an appeal against a judgment of Mr. Justice Adams.

The two plaintiffs are the next-of-kin and administrators of the estates of two men, Ali bin Abdullah and Mohamed Ali bin Siraj who died as a result of a motor accident on 15th October, 1959, near a place called Kayu Ara Pasong, Pontian.

At the time of the accident the two deceased were not employed by the firm called Chuan Seng & Co., Pineapples Factory, who are the defendants in these proceedings. They were, however, riding on a lorry belonging to the defendants with the knowledge and consent of the defendants' driver, but without, so far as the evidence goes, the knowledge or consent of the defendant firm or its manager.

In the course of the journey the lorry overturned and the two deceased were killed and it is conceded that it overturned as a direct result of the negligent driving of the defendants' servant.

In the circumstances it has been said that the defendant firm was liable for their servant's negligence and that was the basis of the case of the two plaintiffs.

Mr. Justice Adams gave judgment in favour of the plaintiffs and gave them damages: special damages in respect of funeral expenses, damages for loss of support under section 7 of the Civil Law Ordinance and damages for loss of expectation of life under section 8 of the Ordinance. He took the view that there was vicarious liability because in his view the driver employed by the defendant firm "had a duty to take care towards all passengers in the lorry whether servants of the firm or not since the firm had taken no precautions to prevent those persons other than the servants from mounting the lorry". Here I think it should be pointed out that both the defendants' manager and the attendant of the lorry had given evidence to the effect that the driver had been specifically forbidden to carry passengers other than employees of the firm proceeding to work. Although that evidence was not contradicted the

A learned trial judge refused to believe it for reasons which, to my mind at any rate, are by no means clear.

The judge then went on to consider the matter on the basis that "it does not matter whether the deceased were trespassers or invitees in this particular case". In my view it does matter. And in my view they were clearly trespassers. The position, therefore, requires to be considered from that point of view.

The case would seem to fall fairly and squarely within the following passage from the judgment of Mr. Justice Uthwatt in the case of *Twine v. Bean's Express Ltd.* (1). What he said was this:—

" it was outside the scope of the driver's employment for him to bring within the class of persons to whom a duty to take care was owed by the employer, a man to whom, contrary to his instructions, he gave a lift "

That passage was quoted by Lord Asquith in the case of *Conway v. George Wimpey & Co. Ltd.* (2). The facts in that case were very familiar to those of the present case with one exception and that is that in that case the defendant firm had affixed a notice to its lorries saying that the giving of lifts was forbidden. That particular fact, however, so far as I am able to satisfy myself played no part in the reasoning of Lord Asquith and Lord Cohen both of whom gave considered judgments and with whom Lord Birkett agreed.

The matter is summarised in the latest edition of *Salmond on Torts* in two places. At page 118 he says:—

" The act of giving a lift to an unauthorised person is not merely a wrongful mode of performing an act of the class which the driver is employed to perform but the performance of an act of a class which he was not authorised to perform at all."

And again at page 515 it is said that:—

" At common law there is no obligation to fence one's land against trespassers or to put up warning notices, however likely it may be that trespassers will come. Thus in *Grand Trunk Railway of Canada v. Barnett* (3) it was held that a trespasser on a railway train had no right of action for damages for personal injuries caused by a collision. The position of those trespassing on motor vehicles is the same."

In my view the learned trial judge misdirected himself here when he said that "it does not matter whether the deceased were trespassers or invitees in this particular case" and on the view I take of the evidence they were clearly trespassers.

Having regard to the authorities I have mentioned I would allow the appeal with costs.

Hill and Good J.J.A. concurred.

Appeal allowed.

Solicitors: *Battenberg & Talma; Chong Thutt Pitt & Co.*